NO. 48792-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

CITY OF TACOMA,

Respondent,

v.

CHEVALIER LEE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Kitty-Ann van Doorninck
Cause No. 15-1-03630-2

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT VIOLATED LEE'S SIXTH AMENDMENT RIGHT TO PRESENT A COMPLETE DEFENSE BY EXCLUDING EVIDENCE THAT SUPPORTED HIS ASSERTION THAT HE ACTED IN SELF-DEFENSE BECAUSE HE REASONABLY BELIEVED HE WAS ABOUT TO BE INJURED.

The City's argument that Lee was not deprived of his Sixth Amendment right to present a defense is misguided and misconstrues the record. Brief of Respondent at 4-10. The City claims that defense counsel sought to elicit testimony from Spicer regarding Lee's state of mind. To the contrary, defense counsel explained that Spicer and Lee were at the Gonzalez home four nights earlier and they saw "some sort of domestic dispute" where Hernandez became "physical with his wife." 2RP 62. Defense counsel argued that the evidence goes to Lee's state of mind when acting in self-defense where he knew that Hernandez had the capacity to be aggressive. 2RP 63. He argued that Spicer would testify that she and Lee saw the incident. 2RP 62-64. The City objected, arguing that it is totally irrelevant and would open the door to collateral issues. 2RP 63-65. The court sustained the City's objection, "I'm sorry. It's just more prejudicial than probative of anything. And I'm not going to allow it." 2RP 65.

In light of the court's ruling, the City's argument that "[n]otably, defense counsel did not attempt to make an offer of proof as to Lee's

observations or his state of mind through Lee himself; rather, he sought to elicit testimony regarding his state of mind through the back door with Spicer's testimony," defies logic. Defense counsel could not question Lee about the incident because the court had previously ruled during Spicer's testimony that the evidence was inadmissible.

Furthermore, the City misapprehends the Washington Supreme Court's analysis in *State v. Jones*, 169 Wn.2d 713, 230 P.2d 576 (2010). Brief of Respondent at 7-8. Jones, who was charged with rape, was prepared to testify that the victim consented to sex during an all-night drug-induced sex party. The trial court refused to let Jones present testimony or cross-examine the victim about the sex party. *Jones*, 169 Wn.2d at 721. The Court reasoned that consent was Jones's "entire defense" and the evidence, if believed, would prove consent, a defense to the charge of rape. *Id.* The Court held that the trial court violated the Sixth Amendment by excluding the evidence which effectively barred Jones from presenting a meaningful defense. *Id.* Importantly, the Supreme Court noted that even if the court had allowed Jones to testify "to the issue of consent alone," the testimony would be "devoid of any context about how the consent happened or the actual events." *Id.*

Similarly, self-defense was Lee's entire defense, and if believed, would be a defense to the charge of assault. Exclusion of evidence that he

and Spicer were at the Gonzalez home four nights earlier and saw Hernandez become physical with his wife during a domestic dispute deprived Lee of providing context to why he was scared and reasonably believed he would be injured. The record substantiates that Lee was prepared to testify about why he was scared. During direct examination, Lee testified that Hernandez came at him with his hands up. "As he sprang at me, he came up, he came like that, he was coming at me, and *I had reason to be scared of him already*." 2RP 80 (emphasis added). The prosecutor objected and the court sustained the objection. 2RP 80. Obviously, defense counsel intended to also have Lee testify about seeing Hernandez become physical with his wife just four nights before Hernandez came at him. The court's exclusion of the evidence during Spicer's testimony consequently excluded testimony from Lee about the same incident.

The City argues that Lee "offered sufficient evidence that he reasonably believed he was about to be injured." However, in closing argument, the City contended that Lee's belief was not reasonable:

> It's not just a belief, and just because a defense, I believe this. It has to be reasonable, just like reasonable doubt. It has to be reasonable. You can use your common sense what would be reasonable under the circumstances. Okay, Louis is not armed. He did not brandish a knife, a weapon. He didn't come at the Defendant with his fists clenched, anything like that. There were no weapons in the vicinity. It wasn't like there was a gun around or something that would be intimidating. *No, and so there was no reasonable fear on the Defendant's part*."

2RP 123 (emphasis added).

The court's exclusion of the evidence allowed the City to argue that Lee had no reasonable belief that he was about to be injured and precluded defense counsel from arguing that Lee's belief was reasonable because just four nights earlier, he saw Hernandez become physical with his wife during a domestic dispute. As this Court concluded in *State v. Upton*, proof "that a defendant knew of a non–remote specific act of violence committed by the victim is admissible in support of defendant's theory of self-defense." 12 Wn. App. 195, 202, 556 P.2d 239 (1976), *review denied*, 88 Wn.2d 1007 (1997)(citing *State v. Adamo*, 120 Wn. 268, 207 P. 7 (1922), *State v. Walker*, 13 Wn. App. 545, 536 P.2d 657 (1975), *State v. Cloud*, 7 Wn. App. 211, 498 P.2d 907 (1972)).

Contrary to the City's argument that the issue is merely an evidentiary ruling, the trial court clearly violated the Sixth Amendment by denying Lee his constitutional right to present a complete and meaningful defense. Furthermore, the City's argument that allowing the testimony "would have unnecessarily served to distract the jury from deciding the issue at hand" lacks merit where rebuttal witnesses are called as a matter of course during trial. 2RP 88.

Reversal is required because the trial court erred in excluding evidence supporting Lee's assertion of self-defense in violation of his Sixth Amendment right to present a complete defense and the court's error was not harmless beyond a reasonable doubt. *See* Brief of Appellant at 9-15.

2. THE PROSECUTOR COMMITTED MISCONDCUT DURING CLOSING ARGUMENT BY COMMENTING ON LEE'S FIFTH AMENDMENT RIGHT TO REMAIN SILENT DEEMED IMPROPER BY THE WASHINGTON SUPREME COURT.

The City recognizes that the Washington Supreme Court concluded that "the prosecutor improperly commented on the right to silence" in *State v. Jones*, but fails to distinguish the improper comments from the prosecutor's comments on Lee's right to remain silent. Brief of Respondent at 13. It is evident that the comments by the prosecutor here are indistinguishable and indefensible under *Jones*, where the Supreme Court condemned such argument as "improper and should not be repeated." *Jones*, 168 Wn.2d at 725.

Unable to distinguish *Jones*, the City claims that the prosecutor's rebuttal argument was "in response to testimony elicited by the defense and was intended to refute any insinuation that the defendant was not able to give his side of the story," citing defense counsel's questioning of Officer Mires. Brief of Respondent at 14. The City's argument fails because it cites no authority that stands for its proposition that a prosecutor can comment

on a defendant's silence in response to questions defense counsel asked of other witnesses. Importantly, the record reflects that Lee never said he could not give his side of the story and never made any prior inconsistent statements. 2RP 73-88. Consequently, the prosecutor's comments on Lee's right to remain silent cannot be justified as impeachment.

Contrary to the City's argument, the prosecutor impermissibly commented on Chevalier's assertion of his right to remain silent "so as to invite the jury to infer guilt from the exercise of a constitutionally protected right." *State v. Burke*, 163 Wn.2d 204, 223, 181 P.3d 1 (2008). Significantly, defense counsel never argued expressly or implicitly during closing argument that Lee "was not able to give his side of the story." 2RP 125-31. The prosecutor's improper comment on Lee's silence in rebuttal was therefore not invited in any way by defense counsel's closing argument. Moreover, the prosecutor's improper comment was all the more prejudicial because it "occurred during [her] rebuttal argument and therefore were the last words from an attorney that were heard by the jury before deliberations." *United States v. Carter,* 236 F.3d 777, 778-89 (6th Cir. 2001).

The City additionally argues that the prosecutor's improper comment on Lee's silence was permissible as evidence of "the flight of a person, following the commission of a crime." The City's argument is

unsubstantiated by the record. Although witnesses said Lee left, they never said that he ran away or fled the scene. In fact, Gonzalez testified that Lee did not immediately leave when he was told that the police were called. 1RP 101-02.

The City argues finally that even if error is found, it was harmless because the "untainted evidence overwhelmingly established that Lee assaulted Hernandez and did not act in self-defense." Brief of Respondent at 16-17. The record belies the City's argument. Gonzales did not see the altercation. 1RP 105. Although Hernandez and Staunton claimed that Lee was the aggressor and he punched Hernandez in the eye, Spicer and Lee described how Hernandez came at Lee. 2RP 15-16, 30-32, 59-60, 78-80. Lee said that when Hernandez sprang at him, he hit him because he was scared. 2RP 80. Such conflicting testimony hardly rises to the level of overwhelming evidence.

Regardless of the fact that defense counsel failed to object, reversal is required because the prosecutor commented on Lee's right to remain silent during closing argument where the Supreme Court emphatically prohibited such argument in *Jones* and a prosecutor is presumed to know the law. *State v. Fleming*, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996), *review denied*, 131 Wn. 2d 1018, 936 P.2d 417 (1997)(we note that this improper argument was made over two years ago and therefore deem it to

be a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial).

3. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT TO THE PROSECUTOR'S IMPROPER COMMENT ON LEE'S RIGHT TO SILENCE AND OFFICER MIRES'S IMPROPER OPINION THAT HE FLED THE SCENE BOTH OF WHICH IMPLIED GUILT.

The City argues that defense counsel was not ineffective in failing to object to the prosecutor's comments because the argument "was in response to testimony elicited by the defense to refute any inference that the defendant did not get to tell his side of the story and was not used to imply substantive evidence of guilt." Brief of Respondent at 18-19. To the contrary, the record establishes that the prosecutor used Lee's silence as substantive evidence of guilt:

> . . . . The Defendant knew the police were being called, so they knew, "Okay, cops are on their way." They don't stay -- and if the Defendant really thought, "Hey, I'm the victim here," wouldn't you stay and wait for the police to come and stay in the area, and when the police got there, say, "Wait a minute, here's what happened." He didn't do that. . . .

2RP 134-36.

Where the prosecutor's argument was emphatically prohibited by the Supreme Court in *Jones*, defense counsel's performance was deficient in failing to object to the prosecutor's improper comments.

The City argues further that defense counsel was not ineffective in failing to object to Officer Mires's opinion because he "was stating a fact – that Lee was not there to interview – and not an opinion as to guilt." Brief of Respondent at 19-20. The City's argument contradicts the record. When Officer Mires was asked why he did not interview Lee or Spicer, he responded, "They had fled prior to police arrival." 1RP 87. He was not stating "a fact" because there was no evidence that Lee and Spicer "fled." Officer Mires testified that he interviewed witnesses but he never said that the witnesses told him that Lee ran away or fled. 1RP 80-84. Officer Mires's unsubstantiated opinion that Lee and Spicer fled the scene clearly implied guilt and defense counsel's performance was deficient in failing to object to his improper opinion.

Lee was prejudiced by defense counsel's deficient performance because his failure to object to the prosecutor's comment on silence and Officer Mires's opinion allowed the jury to hear improper statements that implied guilt.

4. REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DENIED LEE HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The City's argument that the claimed errors had little or no effect on the outcome of the trial in light of the "undisputed evidence that Lee committed the assault and ample evidence that he did not act in self-

defense" is unsubstantiated by the record. Brief of Respondent at 20-21. This Court accordingly considers whether cumulative errors produced a trial that is fundamentally unfair. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994).

Here, the trial court violated Lee's Sixth Amendment right to present a complete defense by excluding relevant evidence, the prosecutor improperly commented on Lee's Fifth Amendment right to remain silent, and Lee was denied his Sixth Amendment right to effective assistance of counsel. The "combined effect of the accumulation of errors most certainly requires a new trial." *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1994).

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Mr. Lee's conviction.

DATED this 12th day of April, 2017.

Respectfully submitted,

/s/ Valerie Marushige
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WSBA No. 25851
Attorney for Appellant, Chevalier Lee

DECLARATION OF SERVICE

On this day, the undersigned sent by e-mail, a copy of Appellant's Reply Brief to Heidi Madson, City of Tacoma Prosecutor's Office, at hmadson@cityoftacoma.org.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of April, 2017.

/s/ Valerie Marushige
VALERIE MARUSHIGE
Attorney at Law

MARUSHIGE LAW OFFICE
April 12, 2017 - 12:36 PM
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